No. 01-672

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SANDRA HENSLEY; *et al.*,
Petitioners,

v.

NORTHWEST PERMANENTE P.C. RETIREMENT PLAN AND TRUST, a defined contribution pension plan; *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' first question aids them only where their desired answer—that the administrators had to draw the legal conclusion that the common law definition of "employee," and no other, could apply—becomes their premise as well. Its logical fallacy makes this Court's consideration of the question unproductive.

Moreover, petitioners' argument was neither presented to nor examined by the Ninth Circuit Court of Appeals. We see from petitioners' brief in that court that their wish for *de novo* review of the administrators' plan interpretation was predicated only upon a claim that the administrators were tainted by a conflict of interest. (*See* Brief of Appellees/Cross-Respondents (petitioners) at pp. 18-26 ("Due to Conflicts of Interest, the Court Should Have Reviewed the Decision Under a Less Deferential Standard of Review").) At no point there did petitioners urge the question they present and argue now. Instead, they substantially conceded the issue:

> The Court in *Firestone*[*] * * * concluded that the *de novo* standard of review was appropriate, except where the Plan expressly provided for administrative discretion in determining eligibility for benefits, in which case the abuse of discretion, or arbitrary and capricious, standard would apply.

(Brief of Appellees/Cross-Respondents at pp. 20-21.)

Petitioners make no contention in this Court of administrator conflict of interest, but that was their sole contention below. The Ninth Circuit was not asked to consider, and did not need to consider, the context of the question that petitioners now present to this Court. (*See* Petition 14a-22a,

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[*] *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Ninth Circuit Opinion.)** Prudence and fairness dictate thatthe Court should deny certiorari on that basis alone. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993).

Petitioners' second question is whether administrators, vested by the plans with full discretion to interpret the plans, are constrained without discretion to apply to the plans the common law definition of "employee" that this Court has applied to the ERISA statute. Petitioners raised that question to the Ninth Circuit, which looked to the unanimous views of the Sixth, Seventh, and Ninth Circuits in rejecting petitioners' argument. 23a-26a.) As discussed later in this Brief, petitioners' attempt to demonstrate an intercircuit conflict on that question does not succeed.

Petitioners offer this Court nothing on which to base a fruitful review of the decision below.

** Appendix page citations in this Brief are to the Appendix to the Petition for Certiorari. The Appendices to this Brief, which are the denial letters of the administrators, are not cited herein by page number.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit, with their correctly stated status before that court:

Sandra Hensley, plaintiff/appellee-cross-appellant.

John Wiest, plaintiff/appellee-cross-appellant.

Linda Onheiber, plaintiff/appellee-cross-appellant.

Donna Hohnstein, plaintiff/appellee-cross-appellant.

Northwest Permanente P.C., an Oregon corporation, defendant/appellant-cross-appellee.

Northwest Permanente P.C. Retirement Plan and trust, a defined contribution pension plan, defendant/appellant-cross-appellee.

Retirement Plans Committee of the Northwest Permanente P.C. Retirement Plan and Trust, an unincorporated association, defendant/appellant-cross-appellee.

Permanente Physicians Retirement Plan for Northwest Permanente P.C., a defined benefit plan, defendant/appellant-cross-appellee.

The Administrative Committee of Permanente Physicians Retirement Plan for Northwest Permanente P.C., an unincorporated association, defendant/appellant-cross-appellee.

CORPORATE DISCLOSURE STATEMENT

Respondent Northwest Permanente P.C. is a privately held corporation with no parent, affiliate or subsidiary corporations.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case Is Inaccurate

The statement of the case submitted by Petitioners/Plaintiffs-Respondents-Cross-Appellants below (hereinafter, "petitioners") is inaccurate. Respondents/Defendants-Appellants-Cross-Respondents below (hereinafter, "respondents") submit that the Ninth Circuit's opinion should be consulted as a more accurate and balanced discussion of the factual background of this case. (*See* 4a-9a); 258 F.3d at 989-91.[1]

[1] Due to a typographical error in the briefs, the district court, the Ninth Circuit and the Petition all refer to the Kaiser Foundation Medical Care Program (the "Kaiser Program") as a "Medicare" program, which is not

Factual inaccuracies in the Petition include the following:

1. The Petition fails to inform the Court that the administrator of each plan not only evaluated petitioners' benefits claims under the historically applied "W-2" definition, but also made findings of fact and determined that petitioners were ineligible to participate even using the common law definition of "employee." (*See* 28a-29a, majority opinion, 29a-32a, Rawlinson, J. concurring; 258 F.3d at 1002-03; 38a, 42a-44a, district court opinion.)[2] In this regard, petitioners have omitted any mention of the following important factual findings of the administrators relevant to their evaluation of petitioners' claims under the common law definition of "employee," which neither the district court nor the Ninth Circuit has found to be erroneous:

- Petitioners have always received their compensation and pension and health benefits from Kaiser Foundation Health Plan ("Health Plan");
- Health Plan has always withheld, reported, and paid the federal and state payroll taxes of petitioners;

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the case. (*See, e.g.*, 5a.); 258 F.3d at 989. Members who enroll in the Kaiser Program are not restricted merely to those receiving "medicare" benefits.

[2] The district court acknowledged that the administrators had evaluated petitioners' claims under the common law definition of "employee," but reversed for reevaluation by the administrators on grounds that their analysis of the common law factors set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), was not, in the district court's opinion, "thorough." (38a, 42a-44a.) The district court's assertion that the factual findings of the administrators were not accompanied by citations to the record is wrong. (43a.) As shown in the denial letters of the administrators (Appendices A through D to this Brief), specific reference was made to a number of sources consulted, in addition to the common knowledge of each administrative committee, concerning the facts relevant to petitioners' claims. The Ninth Circuit found the various factual findings of the administrators "sufficient" under the common law definition. (*See* 28a-29a, majority opinion, 29a-32a, Rawlinson, J. concurring); 258 F.3d at 1002-03.

- Petitioners signed various documents which evidence their clear understanding that they have always been employees of Health Plan, not Northwest Permanente, P.C. ("NWP");
- Petitioners applied for employment with Health Plan;
- Petitioners were hired by Health Plan;
- Petitioners worked at facilities owned by Health Plan;
- NWP does not provide the equipment used by petitioners in their employment;
- NWP physicians do not have authority to determine petitioners' compensation or to terminate petitioners;
- Petitioners' on-the-job grievance procedures are through Health Plan alone; and
- The plan administrators considered a Private Letter Ruling from the Internal Revenue Service ("IRS") to the plans' sponsor, NWP, which stated that W-2 employees of entities within the Kaiser Program other than NWP were not to be considered employees of NWP for tax purposes.

(*See* Appendices A through D; 5a-6a, 27a-29a, 31a-32a; 258 F.3d at 990, 1002-03; 35a.)

These factual findings distinguish this case markedly from cases where it has been unclear whether an individual was an employee or an independent contractor. By their actions, petitioners have acknowledged, agreed and clearly understood at all times that they have always been employed by Health Plan.

2. Petitioners omit a central motivation for the administrators' historical and consistent use of the "W-2" definition. As explained in the Ninth Circuit's opinion, the "W-2" definition was consistently applied as a reasonable interpretation of the term "employee" because "the Plans were designed with only W-2 employees of NWP in mind,

namely NWP physicians," and the IRS had previously issued the Private Letter Ruling holding that petitioners were not employees of NWP for tax purposes. (27a.)

3. NWP is a separate legal entity made up of doctors who provide medical services within the Kaiser Program pursuant to a contractual arrangement between NWP and Health Plan. (5a.) NWP is not an affiliate of Health Plan or Kaiser Foundation Hospitals. (*Id.*)

4. Petitioners fail to inform the Court that the record before the two plan administrators was different. (*See* 6a-7a.) After being informed of their right to a hearing and to submit evidence—such as the Affidavit of Sandra Hensley set forth in the Petition's Appendix (60a-63a)—petitioners informed the administrator of the Northwest Permanente P.C. Retirement Plan and Trust (the "NWP Plan") that they would submit no further evidence and requested a "final decision . . . based on the record as it stands." (7a.) Thus, when the NWP Plan administrator ruled on petitioners' claims, neither the Hensley Affidavit (60a-63a) nor any of the materials attached thereto were in the record. (7a.) Those materials were later submitted, however, to the administrator of the Permanente Physicians Retirement Plan for Northwest Permanente P.C. (the "PPRP"). (*Id.*)

5. The Petition does not accurately describe the decision-making sequence of the plan administrators with respect to petitioners' claims. The Retirement Plans Committee, which administers the NWP Plan, for many years has legally delegated the authority to make initial benefits eligibility determinations on its behalf to Ann Stenzel, the Director of Pensions and Benefits for NWP. (18a-19a & fn.6); 258 F.3d at 997 & fn.6. Similarly, the PPRP administrator has legally delegated the authority to make initial eligibility determinations on behalf of the committee to Ellen Canter, the Director of Employee Benefits Services at Health Plan. (20a-21a); 258 F.3d at 997-98. Thus, petitioners are inaccurate

when they state that "[t]he NWP Plan Committee affirmed the decision of the NWP Plan Administrator and the Physicians Plan Committee affirmed the decision of the Physician Plan Administrator." (Petition at p. 4.) The committees *are* the plan administrators. The committees reviewed and affirmed earlier decisions that they had each issued by and through their legally designated representatives, Stenzel and Canter.

6. Petitioners' assertion that "[n]either plan specifically defines the term 'Qualified Employee'" is incorrect. (Petition at p. 3.) Indeed, as petitioners explain in the paragraph preceding this statement, the plans define "Qualified Employee" in detail; only the term "employee" within the definition of "Qualified Employee" is left undefined.

ARGUMENT

A. The Ninth Circuit Correctly Held that the Administrators' Historical and Consistent Application of a Reasonable "W-2" Definition of "Employee" Was Entitled to Substantial Deference on Review

The Ninth Circuit correctly ruled (1) that the administrators of the plans had plenary discretion under the terms of the plans to interpret plan terms and make eligibility determinations, (2) that the administrators had historically and consistently used a reasonable "W-2" definition of "employee" in making all eligibility determinations, and (3) that the administrators' rulings on petitioners' claims were therefore entitled to substantial deference from the district court on review. Petitioners are correct that a district court reviews *de novo* an administrator's resolution of a legal issue. Petitioners are incorrect, however, in arguing that the administrators resolved an issue of law in determining that petitioners were not eligible to participate under the terms of the respective plans. Given the historical, consistent,

reasonable and fair application of the "W-2" definition in making all eligibility determinations, the particular facts of this case did not require the administrators as a matter of law to use a federal common law definition of "employee." Thus, the decision of the administrators involved a question of plan interpretation, not a determination of common law employee status.

1. Petitioners' Cases Are Inapposite or Distinguishable

No one disputes that an administrator's resolution of a legal issue is reviewed *de novo*, and the Ninth Circuit has incorporated that well-established principle as a corollary to the arbitrary and capricious standard of review. (*See* 27a, stating that a "court may overturn a decision" of an administrator "'where it . . lack[s] . . . authority in governing case or statute law.'" (quoting *Oster v. Barco of Cal. Employees' Ret. Plan*, 869 F.2d 1215, 1218 (9th Cir. 1988)).) *Accord Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1013 (9th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998). The precise issue in this case, however, is whether the administrators were required as a matter of law to apply the common law definition of the term "employee," even though they had plenary discretion under the plans to interpret terms and make eligibility determinations, and had always applied a consistent, reasonable "W-2" definition of the term "employee" in determining who was eligible to participate. The numerous cases petitioners cite for the abstract proposition that review *de novo* review applies where an administrator resolves a legal question are inapposite because they do not address the issue at bar. (*See* Petition at pp. 9-10, citing *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352-53 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Pratt v. Petroleum Prod. Mgmt. Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 657 (10th Cir. 1990); *Brown v. Ret. Comm. of Briggs & Stratton Ret. Plan*, 797 F.2d 521, 525-26 (7th Cir. 1986), *cert. denied*,

479 U.S. 1094 (1987); *Vizcaino*, 120 F.3d at 1013; *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992).)

Petitioners misconstrue or misrepresent the holdings of cases they cite for the proposition that only a federal common law definition of "employee" applies when a plan does not specifically define the term otherwise. As the bullet point discussion below demonstrates, the cases petitioners rely upon are inapposite or distinguishable because they involved either (1) the clear application of ERISA's *statutory* definition of "employee"; (2) an administrator's interpretation of non-plan documents; (3) administrators who, unlike here, had been granted no discretionary authority to interpret plan terms; or (4) plans that expressly incorporated the common law definition of "employee." Contrary to petitioners' suggestion, there is no inter-circuit split as to whether the determination of "employee" status under a federal common law or ERISA statutory definition of the term is ultimately a question of law. All circuits agree that it is.[3] This abstract proposition of law is simply beside the point, however, because it does not address the particular issue in this case. None of the cases cited by petitioners has involved a historically and consistently applied reasonable non-common law definition of the term. This case is unique on its facts, and the closest cases—cited in the Ninth Circuit's opinion, *see* discussion *infra*—indicate that the administrators here acted well within the limits of their plenary discretion to interpret plan terms and make eligibility determinations.

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[3] The Tenth Circuit has stated that "'the determination of whether an individual is an employee is a question of fact.'" *Roth v. Am. Hosp. Supply Corp.*, 965 F.2d 862, 865 (10th Cir. 1992) (quoting *Marvel v. United States*, 719 F.2d 1507, 1515 (10th Cir. 1983)). However, that statement preceded this Court's decision in *Darden*, 503 U.S. 318, where the Court held that "employee," *as used in ERISA*, incorporates traditional agency law criteria for identifying the difference between an employee and an independent contractor.

• In *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1100 & fn.3 (5th Cir. 1990), *de novo* review was applied to the administrator's interpretation of ERISA, not the plan:

> [I]n contrast to the great deference we grant the Committee's interpretations of the Plan, which involve contract interpretation, we accord no deference to the Committee's conclusions as to the controlling law, which *involve statutory interpretation.* The interpretation of ERISA itself must be made *de novo* by the court.[3]

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[3] We are accustomed to giving some deference to governmental agency interpretations of their organic statutes. This case is widely different because it involves whether deference should be given to private parties–a pension committee–in *interpretation of a statute.* We do not give the right to interpret statutes to private citizens. We of course grant deference to the Committee's factual determinations that are necessary to the review of law questions.

(Emphasis added.)

• In *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999), the Fifth Circuit held that *de novo* review applied to the administrators' interpretation of a contract that was not part of the plan:

> In this case, however, the Plan administrators neither made factual determinations nor interpreted the Disability Plan. Instead, the Plan administrators interpreted the meaning of a separate contract between Dial and Marye . . . A court reviews a plan administrator's statutory and legal conclusions *de novo.* Likewise, the district court here did not owe deference to the Disability Plan administrators' *interpretation of a domestic relations order, a contract judicially approved by a state court.*

(Emphasis added; citation omitted.)

• *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987) is off point for two reasons. First, the court addressed the statutory definition of employee because the plaintiff "challenged the Administrators' position that she was hired as a contractor and not as an 'employee,' *as that term is defined by ERISA*." *Id.* at 1535 (emphasis added). As the D.C. Circuit explained, "whether an individual is an employee or an independent contractor" involves "an *interpretation of a statute–ERISA*" and is therefore "a question of law." *Id.* at 1536 (emphasis added). Second, the applicability of the common law definition of "employee" was not at issue because "all parties agree[d] that common-law principles of agency govern[ed] . . ." *Id.* at 1535. Thus, the issue before this Court never arose.

• *Weil v. Retirement Plan Administrative Committee of The Terson Co.*, 913 F.2d 1045 (1990), *vacated in part on reh'g*, 933 F.2d 106 (2d Cir. 1991) also involved an administrator's interpretation of a federal statute. The court explained:

> Here, it is undisputed that the Plan gave the Committee discretionary authority to determine eligibility for benefits and to interpret the Plan. . . .
>
> Nonetheless, the Committee's decision to deny benefits to plaintiffs was unique in that it *turned on a question of law. Article III(26) of the Plan explicitly defines partial termination "within the meaning of Section 411 of the Internal Revenue Code."* When an eligibility determination by plan administrators turns on a question of law, courts have not hesitated to apply a *de novo* standard of review.

Id. at 1048-49 (emphasis added).

• Petitioners' citation to *O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc.*, 37 F.3d 55 (2d Cir. 1994) is curious, since that case actually supports respondents' position. In that case, the plaintiffs argued that the

administrator was required to apply an established statutory definition when interpreting the terms of the plan. *Id.* at 62. The Second Circuit held otherwise and applied the arbitrary and capricious standard of review, according substantial deference to the administrator's interpretation of the plan. *Id.* *O'Neil* demonstrates, point blank, that petitioners' argument is wrong.

• *Berger Transfer & Storage v. Central States, Southeast & Southwest Areas Pension Fund*, 85 F.3d 1374 (8th Cir. 1996) did not involve review of the construction of plan terms by an administrator given plenary discretion. Rather, that case involved review of a district court's determination that truckers "were employees under ERISA" rather than independent contractors. *Id.* at 1380. Furthermore, federal regulations required language in the employment agreements at issue in *Berger* which made it necessary to apply common law factors in determining the employment status of the truckers. *Id.* at 1378-79. The *Berger* decision bears no resemblance to this case.

• *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984) is off base for two reasons. First, the plan incorporated ERISA statutory provisions. *Id.* at 569. Second, the plan expressly provided that "Illinois law shall govern issues of construction." *Id.* The administrator was thus required to apply Illinois "common law" to determine whether the plaintiffs were "employees." *Id*

• In *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 822 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), the plan expressly stated that in construing the phrase "employee status" only the "'common law test, or the applicable statutory definition of master-servant relationship shall control.'" Furthermore, the plan provided that Illinois law controlled "questions of construction." *Id.* at 825.

• *Coonley v. Fortis Benefit Insurance Co.*, 956 F. Supp. 841, 849 (N.D. Iowa), *aff'd*, 128 F.3d 675 (8th Cir. 1997) is inapposite because that case involved the interpretation of an insurance policy (where *contra proferentem* is often applicable), and more importantly, because the court found that "no party assert[ed] that the Plan in question . . . vest[ed] discretionary interpretive authority" in the administrator. Indeed, *Coonley* can be interpreted favorably to respondents because the court observed that if the administrator had been granted the authority to construe plan terms, the "abuse of discretion" standard would have applied. *Id.*

• Nor did *Vizcaino*, 120 F.3d 1006, address the issue at bar. First, both parties "conceded" that the plaintiffs "were common law employees." *Id.* at 1010. Indeed, the parties "asserted that the Workers' status [was] a 'nonissue' because they concede[d] that the Workers were common law employees." *Id.* Furthermore, the plan expressly defined "employee" to mean "'any *common law employee* . . . who is on the United States payroll of the employer.'" *Id.* (emphasis added; ellipsis in original).

• *Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548 (D.C. Cir.), *cert. denied*, 498 U.S. 940 (1990) is distinguishable on several grounds. First, the court was reviewing the decision of a district court, and not of a plan administrator. Second, there is no indication that the district court was vested with the kind of plenary discretion to interpret plan terms that exists in this case. Third, because the district court was not a plan administrator, there was no argument to be made, as respondents argue here, in favor of a reasonable W-2 definition of "employee" that had been applied consistently for many years.

• Finally, petitioners' reliance on *Darden*, 503 U.S. 318, is misplaced because the Court in that case merely held that where Congress has not indicated otherwise, "employee," as used in the ERISA *statute*, incorporates traditional agency

law criteria for identifying the difference between an employee and an independent contractor. As the district court and the Ninth Circuit both observed, *Darden* does not speak to the issue in this case, *i.e.*, whether a federal common law definition of the term "employee" must be used notwithstanding consistent application by the administrator of another reasonable construction of that term as it appears within the confines of an ERISA *plan*. (*See* 25a-26a; 258 F.3d at 1001; 38a-39a.)

2. A Number of Cases Support Respondents' Position

Several cases discussed at length in the Ninth Circuit's opinion support respondents' contention that the administrators were entitled to use the "W-2" definition of "employee" because it had been consistently applied in the past in determining who was eligible to participate in the plans. (*See* 23a-28a, citing *Allen v. W. Conference of Teamsters Pension Trust Fund*, 788 F.2d 648, 650 (9th Cir. 1986) (upholding denial of benefits even though administrators applied a definition of a plan term that conflicted with its established statutory definition); *Admin. Comm. of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981, 986 (6th Cir. 1999) ("To limit an administrator's discretion to only those terms explicitly defined would undermine the administrator's discretionary power or require companies to write interminably long plans to account for every term."), *cert. denied*, 528 U.S. 1114 (2000); *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1440 (7th Cir. 1996) ("Nothing in ERISA . . . compels a plan to use the term 'employee' in the same way it is used in the statute." (citation and internal quotation marks omitted)); *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1113 (9th Cir. 2000) (holding that a consistent pattern of interpretation is "significant evidence"

that the administrator has acted reasonably).) These cases speak for themselves and are far more persuasive on the issue at bar than the cases relied on by petitioners.[4]

B. Certiorari Is Not Warranted Because The Challenged Holding Was Not Essential to the Ninth Circuit's Opinion

A writ of certiorari would accomplish little here because the "holding" of the Ninth Circuit challenged by petitioners was not essential to the disposition of this case. *California v. Rooney*, 483 U.S. 307, 312 & fn.5 (1987). The Petition focuses on the administrators' use of a "W-2" definition of the term employee, but fails to mention the Ninth Circuit's equally dispositive observation that the administrators also applied the common law standard—because petitioners had

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[4] The 1975 state court opinion in *Mayhew v. New England Teamsters*, 347 A.2d 610 (N.H. 1975) is simply incorrect and contrary to the weight of the recent federal case law discussed above. The *Mayhew* opinion was decided only a year after ERISA was enacted in 1974 and did not have the benefit of an established body of federal case law to guide its review of the administrator's decision. The premise of that court's conclusion–that employers may not exclude a class of "employees" from coverage under an ERISA plan–has been debunked by decisions of this Court and other federal courts which have held that an employer has no obligation to provide all "employees" with ERISA benefits. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) ("ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan"). The determination of *who* shall be covered by the plan is, in the first instance, a settlor function performed by the plan sponsor to which no fiduciary responsibility attaches. *Pegram v. Herdrich*, 530 U.S. 211 (2000) ("The specific payout detail of the plan [is] a feature that the employer as plan sponsor [is] . . . free to adopt without breach of any fiduciary duty under ERISA, since an employer's decisions about the content of a plan are not themselves fiduciary acts.").

asked them to do so—and that even under the common law standard, petitioners would lose. Specifically, the Ninth Circuit stated:

> Finally, *the Plan administrators considered the* Darden *factors in determining whether the plaintiffs were employees pursuant to the terms of the Plans, and concluded that they were not.*
>
> *In light of the evidence presented to the district court, and reviewing its decision* de novo, *we conclude the district court erred in denying NWP's motion for summary judgment. . .*
>
> In view of our foregoing conclusions, we need not address NWP's alternative argument that it has set forth an adequate basis from which it would be reasonable to conclude that the plaintiffs are not employees of NWP under the common law definition. *We note, however, that there was sufficient evidence of record to establish that the Plan administrators assessed the plaintiffs' relationship with NWP in light of the appropriate* Darden *factors and concluded that the plaintiffs were not common law employees.* But, inasmuch as we predicate our decision on our conclusion that the Plan administrators did not abuse their discretion in applying a W-2 definition of employee, we do not address this issue further.

(28a-29a); 258 F.3d at 1002 (emphasis added).

The administrators' review of petitioners' claims under the common law standard using the *Darden* factors is emphasized in the concurring opinion of Judge Rawlinson. (*See* 31a-32a); 258 F.3d at 1003. She expressly found it "unnecessary to reach the pivotal issue addressed in the majority opinion" and attacked by petitioners herein, "because the Plan Administrators applied common-law factors in determining plaintiffs' eligibility for plan benefits." (31a); 258 F.3d at 1003.

Petitioners admit that the underlying factual determinations of the administrators are entitled to substantial deference even if the determination of petitioners' employment status is ultimately a question of law. (*See* Petition at pp. 8-9.) A self-serving affidavit from one of the petitioners (60a-63a) cannot overcome the deference accorded to the administrators' factual findings, which the Ninth Circuit found "sufficient" to support the legal conclusion that petitioners were not "employees" of NWP for purposes of plan eligibility. (29a; 258 F.3d at 1002; *accord* 31a-32a; 258 F.3d at 1003, Rawlinson, J. concurring.)

There is no reason for the Court to review this case because the outcome is unchanged even if petitioners are correct in asserting that the administrators, as a matter of law, should have applied a common law definition of "employee." The record establishes that the administrators did review petitioners' eligibility claims under the common law standard in addition to, and apart from, the administrators' determinations that petitioners were ineligible under the historically and consistently followed "W-2" definition. As the Ninth Circuit stated without deciding, and as Judge Rawlinson explained in her concurring opinion, the record contains sufficient evidence to support upholding the administrators' conclusion that petitioners were not even common law "employees" of NWP, and thus were ineligible to participate in the plans no matter which definition of "employee" was utilized.

C. Even If Petitioners Are Correct, A Writ of Certiorari Is Not Appropriate Because the Ninth Circuit Would Have Simply Failed to Follow a Correct Statement of the Law

Absent extraordinary circumstances a writ of certiorari is not necessary merely to correct a lower court's error when it correctly states the law, but fails to properly apply it. *See, e.g., Burrell v. McCray*, 426 U.S. 471, 471-72 (1976)

(Stevens, J. concurring in dismissal of writ of certiorari as improvidently granted); *Watt v. Alaska*, 451 U.S. 259, 275 (1981) ("our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases") (Stevens, J. concurring). Here, even if one assumes *arguendo* that petitioners' position is correct, the Ninth Circuit properly stated the law. It can only be said to have erred in *applying* the law.

The Ninth Circuit has adhered to the principle that the arbitrary and capricious standard of review still provides that an abuse of discretion *per se* occurs when an administrator commits an error of law. (27a); *Vizcaino*, 120 F.3d at 1013; *Schikore v. Bank America Supplemental Ret. Plan*, 269 F.3d 956, 960 ("an error of law constitutes an abuse of discretion"). The Ninth Circuit found that the administrators of the plans committed no legal error in applying their well-established, reasonable "W-2" definition of "employee." If the Ninth Circuit erred in doing so (and it did not), then it erred only insofar as it failed properly to apply a rule of law that it properly stated. This Court need not take cases for the sole purpose of correcting error where the rule of law has been accurately stated.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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